

**Board of Alien Labor Certification Appeals**  
UNITED STATES DEPARTMENT OF LABOR  
WASHINGTON, D.C.

**'Notice: This is an electronic bench opinion which has not been verified as official'**

DATE: March 12, 1997

CASE NO: 95-INA-504

**In the Matter of:**

**QUALITY DENTAL CARE,  
Employer,**

**On Behalf of:**

**MOHAMED ABUKAR,  
Alien**

Appearance: Ashok Menon, Esq.

Before : Huddleston, Holmes, and Neusner  
Administrative Law Judges

FREDERICK D. NEUSNER  
Administrative Law Judge

**DECISION AND ORDER**

This case arose from an application for labor certification on behalf of Abukar Mohamed (Alien) filed by Quality Dental Care (Employer) pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer (CO) of the U.S. Department of Labor at New York, denied the application, and the Employer and the Alien requested review pursuant to 20 CFR § 656.26.<sup>1</sup>

**Statutory authority.** Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary

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<sup>1</sup>The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.<sup>2</sup>

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

**Statement of the case.** On October 7, 1993, Employer filed an application for labor certification to enable the Alien, who is a Somalian national, to fill the employment opportunity position of Assistant Administrator. The Employer's business is operation of a Dental Practice in New York, New York. The duties of the Assistant Administrator in the position offered were described in Form ETA 750 as follows:

Responsible for: (1) Financial Administration of practice, including overseeing all bookkeeping activities, involving management of personnel who perform billing, and receivables/payables; maintenance of payroll for entire staff; establish and operate systems to plan and project future billing, receivables/payables on short/long terms systems to plan and project future billing, receivables/payables on short/long term basis; manage cost containment in the practice, including purchasing and allocation of supplies. 2) Personnel Administration including; hiring evaluating, disciplining, firing and wage determination of non-professional staff; establishing schedule of non-professional staff. 3) Patient relations; Resolve financial problems (e.g. oversee establishment of payment schedules, follow-up on patient bad debt)

AF 05<sup>3</sup> The position minimum requirements stated by the Employer are a college baccalaureate degree with "Any Major." Required training is two years of experience in the job offered or in the related occupation of Office Manager. AF 05. Alien's immediate supervisor in this job will be the Administrator. The Alien will

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<sup>2</sup>Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

<sup>3</sup>Spelling and punctuation unchanged from original.

supervise twenty-four employees.<sup>4</sup> The rate of pay offered for a forty hour week on this position was \$35,000 per year. The local prevailing wage was \$36,066.07. AF 56.

Alien's qualifications. In his application the Alien said he worked for the Employer in various jobs for more than ten years until the date of this application in September 1993. He had graduated with a baccalaureate degree in science with an engineering major in 1980 and in 1985 began studying in the field of economics in a New York institution while working for the Employer. As an assistant bookkeeper from May 1983 to November 1987, he was responsible for supervision of clerical staff, tracking and followup on accounts receivable; and he learned dental terminology, procedures and insurance plans while in this position. After the Employer promoted Alien to bookkeeper in November 1987, his duties until January 1990 were supervision of all accounts payable/receivable activities, payroll for more than fifty employees, and the work of a staff handling the files for a dental practice serving eighty thousand patients. AF 02-03

**Recruitment report.** After the position was posted and advertised four referrals were transmitted to the Employer, of whom at least one U. S. worker appeared to be qualified for the position. AF 37-48.

**Notice of finding.** On March 2, 1995, the CO's NOF advised the Employer that certification would be denied on the record as it stood, subject to rebuttal on or before April 6, 1995.

The CO observed that the position of Assistant Administrator offered by the Employer required two years of experience in the job or in related work as an office manager, and that knowledge of dental terminology, dental procedures, and dental insurance plans was necessary to the performance of this job. See supra for qualifications of the Alien. Noting the Alien's application, the CO said he had no experience in this occupation or the related occupation before he was hired by the Employer in May 1983, and that the Employer must document the reasons it is not possible to train another employee at this time.<sup>5</sup>

If Employer contended, however, that the Alien was hired for one position and later promoted to Assistant Administrator, the Employer was directed to document that it customarily hires

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<sup>4</sup>The CO classified the job under Occupation Code 187.117-010, "Administrator, health care facility."

<sup>5</sup>Employer was also given the option (1) to submit evidence showing that at the time he was hired in 1983 the Alien had the qualifications Employer now is requiring or (2) to reduce the position requirements to those that the Alien had at the time he was first hired.

employees with no experience or knowledge of dental office procedures at lower or entry levels and promotes them. In that case the Employer was required to specify the number of employees it had hired in the preceding ten years who had no experience or knowledge of dental office procedures and whom it promoted to executive positions, and to document its assertions. AF 58-59. Noting that the applicants Falardo, Yousef, Gosine and Panaser were just as well qualified as the Alien was in 1983, when he first was hired by the Employer, the CO directed Employer to document the reasons for concluding that these U. S. workers could not be given the same training as it gave the Alien. By way of a further alternative, Employer was directed to document its reasons for rejecting these four job applicants. AF 59.

**Rebuttal.** By its letter of March 23, 1995, the Employer argued that its requirements are the minimum necessary for the job, contending that the CO erred in assuming that the Alien had no experience in the occupation before it hired him.

Employer conceded that the Alien had acquired the necessary experience for the position

through seven (7) years of progressive professional experience in the area of health care facility administration prior to his accepting [the] position of Assistant Administrator with Quality Dental Care.

The Employer explained that Mr. Mohamed developed his current skill level over the years by filling a variety of positions with varying levels of responsibility and supervisory roles. First, the Employer discussed and analyzed in detail the Alien's duties as an Assistant Bookkeeper from May 1983 through November 1987, describing his responsibilities and supervisory duties, the training he acquired in that position, and the personal contacts he acquired in the process. The Employer then discussed Mr. Mohamed's duties as Bookkeeper from November 1987 through January 1990, when his responsibilities and supervisory duties were materially enlarged. Among the new duties the Employer noted his role in designing the computer programs it used in its dental practice, his acquisition of experience in working with its patient filing system and patient dental records, and his management of the payroll system. While working as bookkeeper, the Alien was directly supervised by the Administrator. AF 85-86.

From 1983 to 1990 the Employer's practice tripled in size from a patient load of 25,000 patients and 28 employees to about 80,000 patients and 59 Employees, including both professional and non-professional staff. In 1990 the Employer responded to this growth by creating the new position of Assistant Administrator to handle the new work more efficiently and, continued the Employer, at that time the Alien "was moved to the newly created position of Assistant Administrator." As Employer explained,

Because of his seven (7) prior years of experience in dental care administration and his unique skills, talent and initiative, [the Employer] found MR. MOHAMED to be the perfect candidate to fulfill the varied responsible duties of ASSISTANT ADMINISTRATOR.<sup>6</sup>

AF 83-84. In his new position, the Alien now oversees the activities of the bookkeeper and has personnel responsibilities in managing the firm's non-professional staff, and he is directly supervised by the Administrator.

**Final Determination.** On April 20, 1995, the CO denied certification, noting that the Alien had no documented experience in the job offered or in the related occupation of office manager before he was hired by the Employer. The CO took into consideration Employer's representation that the Alien was initially hired as Assistant Bookkeeper in May of 1983, promoted to Bookkeeper in November of 1987, and then was promoted to Assistant Administrator, a position the Employer created in 1990 because its practice had more than tripled in size. Basing these findings on the Employer's rebuttal, the CO found that

Although the alien was not initially hired by this employer as an assistant administrator, it is noted that the alien gained experience in all the job duties required of the assistant administrator while employed by this employer in various positions. It appears that this position was created by the employer for the alien.

The CO then concluded that the Employer had failed to demonstrate that the Alien was fully qualified for the position offered before it hired him. In addition, the CO further concluded that the Employer failed to demonstrate that it had established the custom of hiring employees with no experience or knowledge at the entry level and then promoting them from within the firm. AF 90.

Consequently, the CO concluded that the Employer failed to prove it was not feasible to train a U. S. worker for the job in the same manner as it had trained the Alien. The CO then addressed the qualifications of the U. S. applicants and found that one or more were as well qualified as was the Alien at the time he was hired by the employer. AF 89-90.

## Discussion

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<sup>6</sup>Spelling and punctuation unchanged from original.

It is well established under 20 CFR § 656.21(b)(6) that the employer must demonstrate by evidence and documentation that its requirements for the job offered in its application represent the employer's actual minimum requirements for the position, and that it has not hired workers with less training or experience for jobs similar to the position described in its application. Moreover, an employer is not allowed to treat an alien more favorably than it would a U. S. worker. **ERF, Inc. d/b/a/ Bayside Motor Inn**, 89-INA-105(Feb. 14, 1990). An employer violates 20 CFR § 656.21(b)(6), for example, if it hires an alien with lower qualifications than it is now requiring and if it failed to document that it is not feasible to hire a U. S. worker without that training or experience. **Capriccio's Restaurant**, 90-INA-480(Jan. 7, 1992).

In the context of this case, the Employer must establish that the Alien possessed the stated minimum requirements for this position before the Employer hired him, or that the Alien gained his experience with the Employer in a "lesser" position that is "sufficiently dissimilar" to the job offered. **BrentWood Products, Inc.**, 88-INA-259(Feb. 28, 1989)(en banc). In determining whether jobs are sufficiently dissimilar the factors considered include, but are not limited to the relative job duties, supervisory responsibilities, the job requirements of the positions, the position of the jobs within the employer's hierarchy, the employer's prior hiring practices, whether and by whom the higher position has been filled previously, whether the higher position is newly created, the percentage of time performing each job duty, and the respective salary or wages. **Delitzer Corp. of Newton**, 88-INA-482(May 9, 1990)(en banc). The Employer cannot prevail simply by asserting that the positions are different in terms of relative supervisory duties. **Delaney's Restaurant**, 88-INA-174(Oct. 30, 1991); **Lee Gelfond Chocolate, Inc.**, 90-INA-350(Sept., 17, 1991).

The jobs that this Alien held with the Employer evolved in function and responsibility with the growth in Employer's dental practice over the years. As a result, Employer must establish either that the Alien possessed the minimum requirements stated for the position before he was hired by the Employer, or that he gained the requisite experience with the Employer in a "lesser" position that is "sufficiently dissimilar" to the job offered. **BrentWood Products, Inc.**, supra. Because the Alien worked in a series of jobs, each of which was a promotion from the previous position, the issue turns on the nature of the qualifications required by the jobs he held in Employer's organization that preceded his elevation to the position in question.

The Employer's rebuttal indicates that the Alien's duties and position as Bookkeeper in the business hierarchy were so close to the work of Assistant Administrator as to be virtually

the same job with a new title. The Employer has not presented evidence that rebuts the inference that these jobs were similar as to their relative duties, supervisory responsibilities, and relative positions in employer's hierarchy. The asserted shifts in percentages of time allotted to various functions are noted, but given little credence, as the nature and content of such changes are unexplained, undocumented, and unsupported by credible evidence. As the position clearly was created for the Alien in 1990, on its face the job is seen to have evolved over time from his position as Bookkeeper.

Consequently, Employer's burden of proof required that it establish with great clarity the distinction between the positions of Assistant Administrator and Bookkeeper, which the Employer's evidence has failed to do in this case. **Delitzer Corp. of Newton**, 88-INA-482(May 9, 1990)(en banc). First, the Administrator is still the Alien's supervisor. Second, the increase in the burden of the responsibilities of the Alien was the result of the growth of the dental practice between 1983 and 1990. For these reasons it is found that the changes resulting from the natural evolution of the job include the increase in the number of subordinates supervised by the Alien, the need for greater involvement in personnel matters, and the increase in the sophistication of his pre-existing duties that related to the collection of receivables, insurance program administration, record maintenance and management, and the analysis of the patients' dental records.

It was Employer's burden to explain how a U. S. worker who began as an Assistant Bookkeeper with skills equal to those the Alien possessed in 1983 could fail to qualify for the position of Assistant Administrator in 1990, if the Employer gave that worker the same opportunity to train and to grow with its business that the Alien enjoyed over a period of many years. Notwithstanding the Employer's rebuttal argument, it failed to demonstrate that the Alien's present position is not the result of a combination of on-the-job training and the evolution of his original job with the growth of its dental practice over a period of more than a decade.

As we agree with the conclusion of the CO, the following order will enter.

**ORDER**

The decision of the Certifying Officer denying certification under the Act and regulations is affirmed.

For the Panel:

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FREDERICK D. NEUSNER  
Administrative Law Judge

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W., Suite 400  
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

## BALCA VOTE SHEET

Case Name: **Quality Dental Care, Employer**  
**Abukar Mohamed, Alien**

Case No. : 95-INA-504

PLEASE INITIAL THE APPROPRIATE BOX.

	:	:	:	:			
	:	CONCUR	:	DISSENT	:	COMMENT	:
	:	:	:	:	:	:	:
Holmes	:	:	:	:	:	:	:
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Huddleston	:	:	:	:	:	:	:
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Thank you,

Judge Neusner

Date: February 28, 1997